

5-28-2009

## State v. Pierce Respondent's Brief Dckt. 35063

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**COPY**

STATE OF IDAHO,

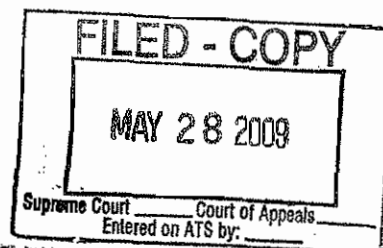
Plaintiff-Respondent,

vs.

LUIS JAMES PIERCE,

Defendant-Appellant.

NO. 35063



**BRIEF OF RESPONDENT**

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA**

**HONORABLE MICHAEL E. WETHERELL**  
District Judge

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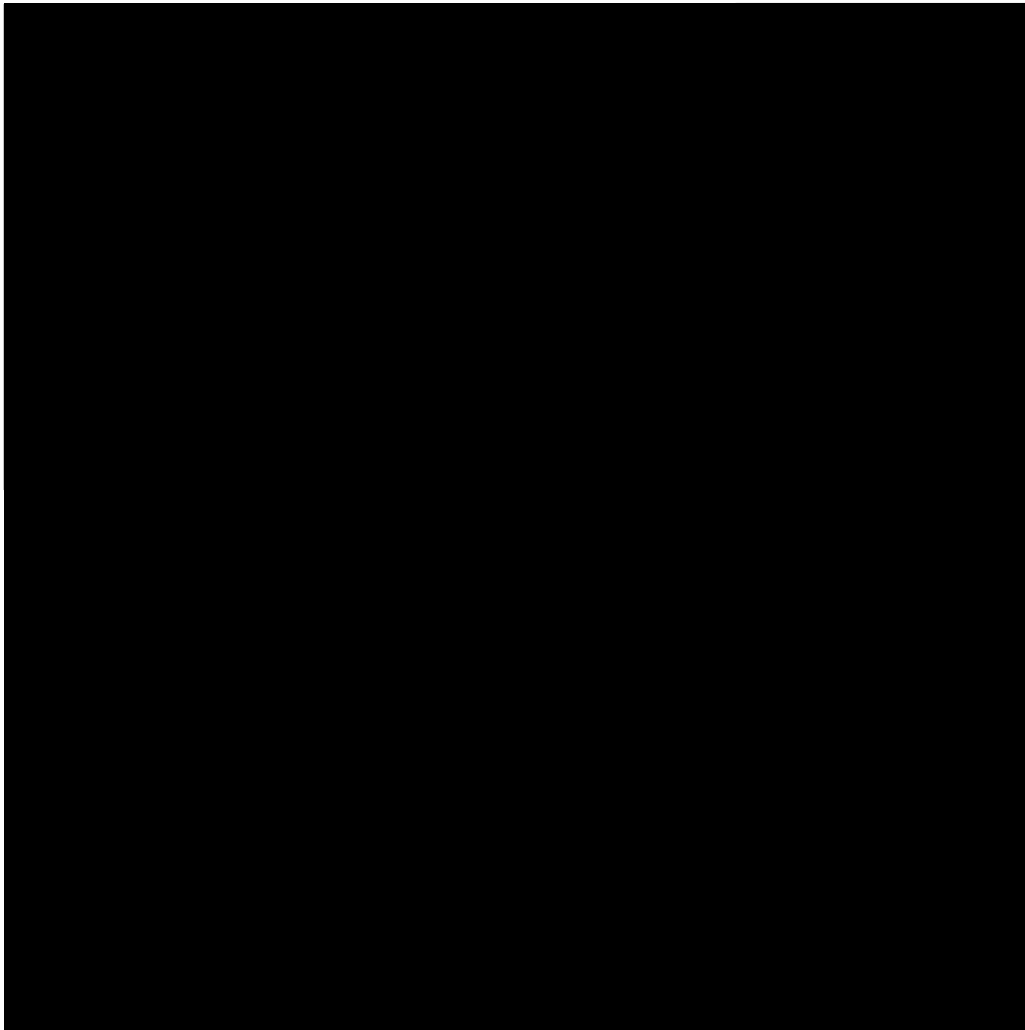
## STATEMENT OF THE CASE

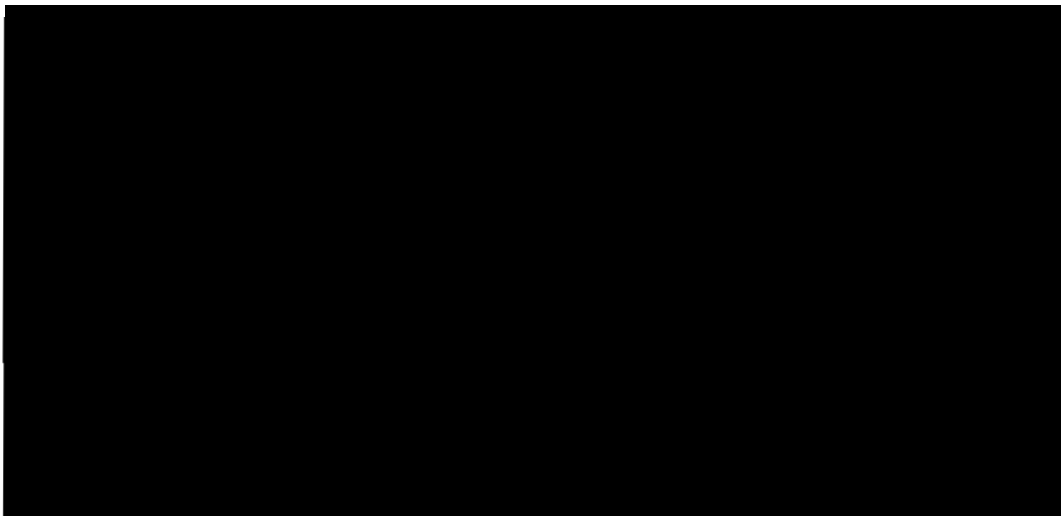
### Nature Of The Case

Luis James Pierce appeals from the district court's order revoking his probation. Notwithstanding the fact that his appeal is from an order revoking probation, Pierce also requests his underlying conviction be vacated.

### Statement Of The Facts And Course Of The Proceedings

Pierce was arrested after having sexual contact with a four-year old girl he was babysitting. The pre-sentence investigation report ("PSI") sets forth the facts leading to Pierce's arrest:





(9/14/06 PSI, p.2.)

The state filed a complaint charging Pierce with sexual abuse of a child under the age of sixteen years. (Augmented Record: 3/7/06 Complaint.) In that complaint, the state neglected to assert that Pierce was over the age of eighteen. Pierce was arraigned on this charge and a preliminary hearing was set. (Augmented Record: 3/7/06 Ada County Magistrate Minutes.) However, on the date set for the preliminary hearing, the state filed a motion to dismiss the complaint which was granted. (Augmented Record: 3/20/06 Ada County Magistrate Minutes; 3/20/06 Order of Release.) The state filed a new complaint the following day alleging the same crime but specifying that Pierce was over the age of eighteen when the crime occurred. (R., pp.7-8). Pierce was bound over to the district court following a preliminary hearing. (R., pp.13-21.)

Pierce pled guilty and was sentenced to a unified term of fifteen years, with five years fixed. (R., pp.41, 51-54.) The district court retained jurisdiction, however, and placed Pierce in the retained jurisdiction program. (R., pp.52-53.) Pierce completed the program and was placed on probation for a period of



fourteen years. (R., pp.58-71.) Seven months into Pierce's probation, the state filed a motion for probation violation. (R., pp.78-81.) Pierce admitted to violating his probation by frequenting places where minors or victims of choice congregate, by failing to complete sex offender treatment, and by failing to pay his supervision fees. (12/13/07 Tr., p.10, L.21 - p.11, L.20.)

The district court revoked Pierce's probation and ordered his underlying sentence executed. (R., pp.89-91.) Pierce filed a timely Notice of Appeal from the Order of Revocation of Probation, Imposition of Sentence and Commitment. (R., pp.92-94.)

## ISSUES

Pierce states the issues on appeal as:

- 1 Has Mr. Pierce's right to be free from trial by Information after a grand jury has ignored a charge, protected by Article I § 8 of the Idaho Constitution, been violated requiring that his conviction be vacated as the district court did not have subject-matter jurisdiction over the alleged crime?
- 2 Did the district court abuse its discretion after Mr. Pierce admitted to violating his probation by executing his original sentence under the facts and circumstances of this case?

(Appellant's Brief, p. 8.)

The state rephrases the issues as:

1. Has Pierce failed to show he is entitled to vacate his underlying conviction in an appeal from an order revoking probation where he entered a valid guilty plea waiving any defect in the probable cause determination?
2. Has Pierce failed to meet his burden of showing his constitutional rights were violated as a result of the grand jury allegedly ignoring the charge against him where there is no evidence in the record to support such a claim?
3. Has Pierce failed to carry his burden of establishing the district court clearly abused its discretion when it ordered executed the originally imposed sentence upon revocation of Pierce's probation?

## ARGUMENT

### I.

#### Pierce Has Failed To Meet His Burden Of Establishing A Jurisdictional Claim And Therefore Waived His Claim Of Error When He Entered His Guilty Plea

##### A. Introduction

Pierce seeks to vacate his conviction by claiming the trial court lacked subject matter jurisdiction over his case due to an alleged violation of Article I, § 8 of the Idaho Constitution. Pierce's claim fails because Article I, § 8 is not a jurisdictional provision and, therefore, any claimed defect was waived when Pierce pled guilty.

##### B. Standard Of Review

Jurisdiction is a question of law, given free review. State v. Kavaiecz, 139 Idaho 482, 483, 80 P.3d 1083, 1084 (2003).

##### C. Article I, § 8 Is Not A Jurisdictional Provision And, Even If It Could Be Construed As Such, It Would Relate To A Court's Personal Jurisdiction Not Subject Matter Jurisdiction

Pierce claims the district court lacked jurisdiction in his underlying criminal action because he claims the prosecutor violated Article I, § 8 of the Idaho Constitution. That constitutional provision provides:

**Prosecutions only by indictment or information.** -- No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate, except in cases of impeachment, in cases cognizable by probate courts or by justices of the peace, and in cases arising in the militia when in actual service in time of war or public danger; provided, that a grand jury may be summoned upon the order of the district court in the manner provided by law, and provided further, that after a charge has been ignored by a grand jury, no person

shall be held to answer, or for trial therefore, upon information of the public prosecutor.

According to Pierce, an information filed in violation of Article I, § 8, i.e., an information filed after the charge is submitted and ignored by a grand jury, is a “nullity” and fails to confer subject matter jurisdiction. (Appellant’s Brief, pp.13-16.) As set forth below, this claim is without merit. Pierce acknowledges the absence of any authority to support his claim<sup>1</sup>, but argues such a conclusion is compelled by “the plain reading of the constitutional provision” and the dissenting opinion in State v. Wilson, 41 Idaho 598, 242 P. 787 (1925). (Appellant’s Brief, pp.14-16.) Even assuming *arguendo* that the information in this case was filed in violation of Article I, § 8, Pierce’s claim that the information was a nullity and failed to confer subject matter jurisdiction on the court fails.

The courts of Idaho are vested with the subject matter jurisdiction conferred upon them by the Idaho Constitution and the statutes of this state. Pursuant to Article V, § 20 of the Idaho Constitution and I.C. §§ 1-705 and 18-202, the district courts of Idaho are vested with original subject matter jurisdiction over all crimes committed within this state. See also State v. Doyle, 121 Idaho 911, 828 P.2d 1316 (1992) (an Idaho court will have subject matter jurisdiction over a crime if any essential element of the crime, including the result, occurs

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<sup>1</sup> The only authority Pierce cites is the dissenting opinion in State v. Wilson, 41 Idaho 616, 242 P. 787 (1925). The state acknowledges that in Wilson a dissenting justice asserted that a violation of Article I, § 8 deprived the court of jurisdiction and that as a result the “verdict of guilty and the judgment of conviction thereon are void.” 41 Idaho at 616. 242 P. at 792. Although, the majority never addressed the issue directly, the majority obviously rejected this argument because it affirmed Wilson’s conviction. Id. at 607.

within Idaho). It is well established that it is the charging document that confers subject matter jurisdiction on a district court. State v. Rogers, 140 Idaho 223, 228, 91 P.3d 1127, 1133 (2004) (“The information, indictment, or complaint alleging an offense was committed within the state of Idaho confers subject matter jurisdiction upon the court.”) (citing State v. Slater, 71 Idaho 335, 338, 231 P.2d 424, 425 (1951)). The jurisdictional question presented by any charging document is whether it alleges that a criminal offense was committed within the state of Idaho. State v. Jones, 140 Idaho 755, 757-58, 101 P.3d 699, 701-02 (2004). The Idaho Court of Appeals has clearly explained what constitutes a jurisdictional defect and what deprives the court of subject matter jurisdiction: “A jurisdictional defect exists in an indictment or information: 1) when the alleged facts are not made criminal by statute; 2) there is a failure to state facts essential to establish the offense charged; 3) the alleged facts show on their face that the court has no jurisdiction of the charged offense; or 4) the allegations fail to show that the offense charged was committed within the territorial jurisdiction of the court.” State v. Izzard, 136 Idaho 124, 127, 29 P.2d 960, 963 (Ct. App. 2001).

None of the above mentioned defects exist in this case. The information Pierce pled guilty to alleged facts sufficient to charge an offense made criminal by statute and that the crime was committed in the territorial jurisdiction of the court. (R., pp.20-21.) Accordingly, Pierce has failed to meet his burden of showing that the district court was without subject matter jurisdiction.

Pierce nevertheless argues that, regardless of the information’s facial validity, the indictment process was jurisdictionally defective in light of Article I, §

8. As a result, he claims he can challenge his conviction at anytime. Pierce is mistaken. Article I, § 8 is not a jurisdictional provision but a constitutionally provided affirmative defense.

A plain reading of the text of Article I, § 8 makes clear that if a prosecutor elects to proceed to a probable cause determination via grand jury and the grand jury ignores the charge, i.e., returns a no bill, the prosecutor is precluded from filing the same charge by way of information. Article I, § 8 is a procedural framework that governs how the state may charge an individual with a crime. In this sense it is like another Idaho constitutional provision, the double jeopardy clause, and operates as an affirmative defense to prosecution under certain circumstances. See Idaho Constitution Article I, § 13 ("No person shall be twice put in jeopardy for the same offense."); see also U.S. Const. amend. V. "An affirmative defense is an argument or assertion of fact that, if true, will defeat the plaintiff's claim even if all allegations in the complaint are true." Douglas Disposal, Inc. v. Wee Haul, LLC, 170 P.3d 508, 513 (Nev. 2007). However, affirmative defenses such as double jeopardy are not jurisdictional and may be waived. See State v. Magill, 119 Idaho 218, 219-20, 804 P.2d 947, 948-49 (Ct. App. 1991) (defendant's guilty plea was not conditional and waived issues of venue and double jeopardy). There is no basis for distinguishing between the affirmative defense provided by Article I, § 8 and the double jeopardy provision found in Article I, § 13. Neither provision says anything about jurisdiction, yet both provide bars to subsequent prosecution.

Because Article I, § 8 is an affirmative defense and not jurisdictional it can be waived by the entry of a valid plea. "Ordinarily, a valid plea of guilty waives all non-jurisdictional defects and defenses, whether constitutional or statutory, in prior proceedings." State v. Kelchner, 130 Idaho 37, 39, 936 P.2d 680, 682 (1997); State v. Book, 127 Idaho 352, 354, 900 P.2d 1363, 1365 (1995); State v. Salinas, 134 Idaho 362, 367, 2 P.3d 747, 752 (Ct. App. 2000) (guilty plea waives all non-jurisdictional challenges to conviction for purposes of direct appeal). Here, Pierce pled guilty to sexual abuse of a minor. (08/01/06 Tr., p.1, L.1 - p.16, L.21.) Consequently, Pierce waived his right to make a challenge under Article I, § 8.

Pierce's claim also fails even if it is viewed not as an affirmative defense but as a general challenge to the probable cause determination. Because defects in the probable cause determination process do not deprive courts of subject matter jurisdiction, Idaho courts require challenges to those defects be made in a timely manner. State v. Fowler, 105 Idaho 642, 671 P.2d 1106 (Ct. App. 1983), illustrates this principle.

In Fowler the defendant asked the court to overturn his conviction because of a defect in the preliminary hearing process. 105 Idaho at 643, 671 P.2d at 1106. The court of appeals concluded Fowler waived his right to challenge the probable cause determination once he pled guilty:

[W]e hold that Fowler's plea of guilty to that new charge waived his right to contest the preliminary hearing procedure. The purpose of a preliminary hearing is to determine whether there is probable cause to require the accused to stand trial. It is well settled that a valid plea of guilty, voluntarily and understandingly given, waives all non-jurisdictional defects and defenses, whether constitutional or

statutory, in prior proceedings. Here Fowler does not attack the entry and acceptance of his plea. *His plea of guilty to the restaurant burglary therefore constituted a waiver of the procedure to determine probable cause*, just as if he had waived the preliminary hearing itself, on that charge.

Id. (emphasis added, internal citations omitted). Here, just like in Fowler, the claimed defect is in the process and procedure to determine probable cause. Thus, here, just as in Fowler, Pierce waived any claimed defect in that process by entering his guilty plea.

In sum, Article I, § 8 is not jurisdictional but a constitutionally provided affirmative defense akin to double jeopardy. As such, the defense was waived when Pierce pled guilty. To the extent Pierce's claim is construed as a challenge to the probable cause determination, any such claim was also waived as a result of Pierce's guilty plea.

## II.

### Pierce Has Failed To Show From The Record That The Grand Jury Heard And Ignored The Charge Against Him Or, In The Alternative, That His Claim Was Not Waived When He Entered His Guilty Plea

#### A. Introduction

Pierce claims "a grand jury heard his case and ignored the charge against him despite the fact that there is no official document in the record indicating as such." (Appellant's Brief, p.9.) Pierce's claim is without merit. There is no evidence that the "grand jury heard his case and ignored the charge against him." (Appellant's Brief, p.22.)



B. Standard Of Review

An appellant bears the burden of providing an adequate record to substantiate his claim of error. In the absence of an adequate record, error will not be presumed; rather, missing portions of the record must be presumed to support the action of the trial court. Retamoza v. State, 125 Idaho 792, 795, 874 P.2d 603 (Ct. App. 1994).

C. The Record Does Not Establish That The Grand Jury Heard A Charge Against Pierce Or That The Grand Jury Ignored That Charge Prior To An Information Being Filed Against Him

Pierce claims a grand jury ignored the child abuse charge against him prior to the filing of the information. (Appellant's Brief, p.29.) Pierce, however, has failed to support this claim with evidence from the record and, therefore, has failed to meet his burden of establishing a valid claim. As set forth above, Article I, § 8 of the Idaho Constitution states "that after a charge has been ignored by a grand jury, no person shall be held to answer, or for trial therefore, upon information of the public prosecutor." Pierce concedes "[n]o document exists in the record unquestionably showing that a grand jury heard and ignored the charge against Mr. Pierce." (Appellant's Brief, p.17.) Nevertheless, he claims he has met his burden because of a single off-hand and unrelated statement made by a prosecutor who was not the primary prosecutor handling the case. That statement, in context, made at Pierce's sentencing hearing, was as follows:

THE COURT: And has the State received these materials, Ms. Fisher, and had adequate time to review them?

MS. FISHER: I have, Your Honor. And what was *not* included in those that I saw in Ms. Armstrong's file are two photographs of the children in question. I would like to include those for purposes of the pre-sentence investigation. These were shown to the grand jury as well.

(10/25/06 Tr., p.18, Ls.14-23.) Pierce claims this single and isolated statement is sufficient proof that the grand jury both heard and ignored the charge against him. Pierce is mistaken. In no way does this isolated statement satisfy Pierce's burden of proving that a grand jury heard and ignored the charge against him.

There is nothing in the record that supports Pierce's claim that the prosecutor's statement was an "admission" that a grand jury reviewed this case. (Appellant's Brief, p.18.) Indeed, the record reveals evidence of the contrary -- that the prosecuting attorney was confused or simply made a mistake. As admitted by Pierce, there is no documentation that supports the claim that the grand jury heard and ignored Pierce's case. Not only is there no documentation or record of a grand jury reviewing the case, but the documentation that does exist shows that this case proceeded by complaint, which was filed the day after law enforcement interviewed Pierce regarding the allegations. (Compare 9/14/06 PSI, p.2 (indicating interview with law enforcement on 3/6/06) with original complaint (Augmented Record: 3/7/06 Complaint)). Pierce was arraigned that same day and a preliminary hearing was set for March 20, 2006. The case was dismissed on the date of the preliminary hearing and a new complaint was filed the following day. (Augmented Record: 3/20/06 Ada County Magistrate Minutes, Order of Release dated 3/20/06.) Pierce's assumption that the state was

simultaneously attempting to proceed against him via grand jury indictment has no support in the record.

Pierce also relies on a letter from the Ada County Court Clerk, J. David Navarro made in response to the Supreme Court's order to conduct a search of grand jury proceedings involving Pierce. (12/12/08 Response of the District Court Clerk to Order Re: Motion to Augment and to Suspend the Briefing Schedule Pending Grand Jury Determination (emphasis added)). Pierce argues this Court should determine that this letter is factual support for his claim that a grand jury heard and ignored the charge against him. As a threshold matter, however, Pierce's reliance is misplaced. It is inappropriate to request an appellate court to make a factual determination on evidence not before the district court. See Weekly v. City of Mesa, 888 P.2d 1346, 1353 (Ariz. App. 1994) ("We will not presume to make such factual determinations for the first time on appeal.").

Even if this Court considers the letter, the letter does not support Pierce's claim that it is evidence that a grand jury heard and ignored the charge against him. The clerk responded to the Supreme Court's order to conduct a search of grand jury proceedings involving Pierce as follows:

The staff of the clerk's office was unable to locate any records regarding grand jury proceedings involving the Defendant-Appellant nor any information that such proceedings took place. The staff's search indicated that records of three grand jury proceedings (Nos. 22, 23 and 24), which *may* have taken place during the approximate time frame, were not received by the clerk's office. The clerk's staff was unable to find any grand jury minutes, voting records, or other documents showing that a grand jury declined to issue an indictment against the Defendant-Appellant.

(12/12/08 Response of the District Court Clerk to Order Re: Motion to Augment and to Suspend the Briefing Schedule Pending Grand Jury Determination (emphasis added)). Despite making clear that there were no records regarding grand jury proceedings involving Pierce, Pierce nonetheless argues that the response supports his claim. Specifically, he argues the letter shows there were actual grand proceedings on those days and the fact that there is no evidence of the grand jury ignoring the charge against him means little because the proceedings are secret and because there is “no criminal rule that specifically states what a grand jury is to do when they ‘ignore’ a charge.” (Appellant’s Brief, pp.19-21.) Pierce fails to appreciate, however, the clerk’s response that although there “may have been” grand jury proceedings on the days in question, there were simply no records involving Pierce -- “no grand jury minutes, voting records, or other documents showing that a grand jury declined to issue an indictment against” Pierce. (12/12/08 Response of the District Court Clerk to Order Re: Motion to Augment and to Suspend the Briefing Schedule Pending Grand Jury Determination). Again, evidence that contradicts Pierce’s claim that a grand jury ignored the claim against him.

### III.

#### Pierce Has Failed To Establish The District Court Clearly Abused Its Discretion When It Ordered Executed The Previously Imposed Sentence Upon Revoking Pierce’s Probation

##### A. Introduction

Pierce also contends the district court abused its discretion when, upon revoking Pierce’s probation, it ordered executed the previously imposed, but

suspended, fifteen-year sentence with five years fixed. (Appellant's Brief, p.23.) Specifically, Pierce claims his sentence is excessive "considering the nature of his criminal act and his actions since that time." (Appellant's Brief, pp.23.) Pierce has failed to show an abuse of discretion because Pierce has failed to establish how the sentence has been rendered unreasonable since imposition of his sentence.

B. Standard Of Review

To prevail on appeal, Pierce must establish that the district court clearly abused its discretion in ordering executed the previously imposed sentence. See State v. Grove, 109 Idaho 372, 707 P.2d 483 (Ct. App. 1985); State v. Tucker, 103 Idaho 885, 655 P.2d 92 (Ct. App. 1982). The court may, after a probation violation has been proven, order the suspended sentence to be executed or, in the alternative, the court is authorized under I.C.R. 35 to reduce the sentence. State v. Marks, 116 Idaho 976, 977, 783 P.2d 315, 316 (Ct. App. 1989). On review, the appellate court must determine whether the district court acted within the boundaries of its discretion, consistent with any legal standards applicable to its specific choices, and whether the district court reached its decision by an exercise of reason. State v. Beckett, 122 Idaho 324, 325, 834 P.2d 326, 327(Ct. App. 1992).

However, if the original sentence was not appealed, an appellate court will not review that original sentence for excessiveness upon the facts then existing. Grove, 109 Idaho at 373, 707 P.2d at 484; Tucker, 103 Idaho at 887-88, 655 P.2d at 94-95. Rather, the focus is upon all circumstances bearing on the

decision to order the previously imposed sentence into execution, including events occurring between the original pronouncement of sentence and the revocation of probation. Grove, 109 Idaho at 373, 707 P.2d at 484.

C. Pierce Has Failed To Establish That The District Court Clearly Abused Its Discretion When It Ordered Executed The Originally Imposed Sentence Upon Revocation Of Probation

Pierce first argues the district court abused its discretion by ordering executed the original sentence because “of the nature of the offense and the character of the offender.” (Appellant’s Brief, p.28.) Because Pierce did not directly appeal the original sentence for child abuse he “may not now challenge the reasonableness of the sentence originally imposed.” State v. Coffin, 122 Idaho 392, 394, 834 P.2d 909, 911 (Ct. App. 1992). Rather, the focus is “restricted to a determination of whether [Pierce’s] sentence now appears excessive in light of circumstances existing when the court ordered the sentence to be executed upon revocation of probation.” Id. Pierce has failed to meet his burden.

While Pierce goes to great lengths to describe the unreasonableness of his underlying sentence in reference to circumstances at that time, see, e.g., “it should be recognized that the nature of Mr. Pierce’s offense, while certainly criminal and deserving of punishment, was not severe” (Appellant’s Brief, p.24), “in exchange for nothing, Mr. Pierce agreed to plead guilty” (Appellant’s Brief, p.25), “Mr. Pierce was 23 years old at the time of his original sentencing” (Appellant’s Brief, p.25) and “Mr. Pierce’s biggest problem is his alcoholism” (Appellant’s Brief, pp.25-26), there is very little regarding his actions between the

original pronouncement of sentence and the revocation of probation. Indeed, the only argument Pierce makes is that during this time period he admitted to violating his probation and did not re-offend by committing an additional sex crime or another criminal act. Such claims, even if true, do not render a reasonably imposed sentence unreasonable.

In contrast, the probation officers that filed the report of probation violation concluded that from the time of his release on probation "Pierce has worked hard at flying under the radar of Bethal Ministries and Probation & Parole" and that "he is more motivated toward associating with prohibited persons and minors than he is in addressing the thoughts and behaviors that led to his conviction." (Report of Probation Violation, p.5 (attached to 1/25/08 PSI).) The officer concluded Pierce "sees nothing wrong with having physical contact with minors, despite his instant offense and probation conditions prohibiting such contacts." The probation officer reached these conclusions because Pierce failed to participate in any sex offender treatment as required, ignored conditions of his probation by going to places where children congregate, and by failing to pay certain fees. Id.

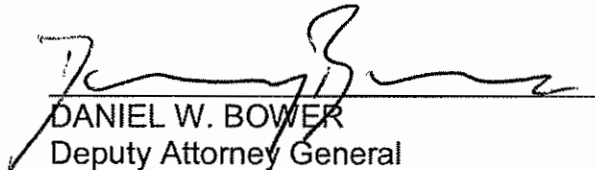
In light of these statements, the record clearly demonstrates probation was not effective. Pierce refused to attend the treatment he was under court order to complete. Pierce committed a sexual crime against a child and his treatment is necessary to ensure the protection of society. Furthermore, as his actions have indicated, he is unwilling to do what the court asks of him. Considering all the facts of this case, Pierce has failed to establish the district

court abused its discretion in revoking his probation and ordering his sentence executed without reduction.

CONCLUSION

The state respectfully requests Pierce's conviction, probation revocation, and sentence be affirmed.

DATED this 28th day of May 2009.

  
DANIEL W. BOWER  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of May 2009, served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

JASON PINTLER  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

  
DANIEL W. BOWER  
Deputy Attorney General

DWB/pm



